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In the Supreme Court of the United States

OCTOBER TERM, 1982

THOMAS H. FERGUS, and
LOUISE P. BRADSHAW, a/k/a
LOUISE BRADSHAW FERGUS,

Petitioners,

versus

STATE OF LOUISIANA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE LOUISIANA SUPREME COURT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1] Does a sentence predicated on all or in part on false unreliable and unsubstantiated information violate due process under the 14th Amendment of the U.S. Constitution?

2] Must the defendant in a pre-sentence hearing bear the burden of proof in rebutting unsubstantiated and unreliable information which may have come to the attention of the sentencing judge?

3] Does the failure of the sentencing Judge to individualize his sentence by not fitting the punishment to the offender rather than the crime violate Article 8 of the U.S. Constitution?

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PETITION FOR A WRIT OF CERTIORARI TO THE LOUISIANA SUPREME COURT

PETITION FOR WRIT OF CERTIORARI

Petitioners, Thomas H. Fergus, and Louise P. Bradshaw, a/k/a Louise Bradshaw Fergus, respectfully pray that a writ of certiorari issue to review the judgment and opinion of the Supreme Court for the State of Louisiana entered in these proceedings on June 21, 1982, which affirmed the judgment and sentence of the Fourth Judicial District Court for the Parish of Ouachita, State of Louisiana, where petitioners having pled guilty to the crime of attempted distribution of a controlled dangerous substance—marijuana, were each sentenced to five (5) years at hard labor and to pay a fine of $2500 and costs, in default of the payment of fine and costs, to serve one additional year. (Appendix A).

OPINIONS BELOW

The dictated reasons for sentencing as they appear in the record are reprinted in Appendix A.

The opinion of the Supreme Court of the State of Louisiana represented at 418 S. 2d. 594, is reprinted in Appendix B.

The denial of rehearing by the Supreme Court of the State of Louisiana by memorandum is reprinted in Appendix C.

JURISDICTION

The judgment of the Supreme Court of the State of Louisiana was entered on June 21, 1982. A timely petition for rehearing was denied on September 3, 1982, and petition for certiorari was filed within sixty (60) days of that date. The Court's jurisdiction is invoked under 28 U.S.C. Sec. 1257(3).

TEXT OF AUTHORITIES INVOLVED

Article VIII of the United States Constitution:

> Excessive bail shall not be required; nor excessive fines imposed, nor cruel and unusual punishments inflicted.

Fourteenth Amendment to United States Constitution, Section 1:

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall bridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Louisiana Code of Civil Procedure, Article 894.1:

A. When a defendant has been convicted of a felony or misdemeanor, the court should impose a sentence of imprisonment if:

(1) There is an undue risk that during the period of a suspended sentence or probation the defendant will commit another crime;

(2) The defendant is in need of correctional treatment or a custodial environment that can be provided most effectively by his commitment to an institution; or

(3) A lesser sentence will deprecate the seriousness of the defendant's crime.

B. The following grounds, while not controlling the discretion of the court, shall be accorded weight in its determination of suspension of sentence or probation:

(1) The defendant's criminal conduct neither caused nor threatened serious harm;

(2) The defendant did not contemplate that his criminal conduct would cause or threaten serious harm;

(3) The defendant acted under strong provocation;

(4) There was substantial grounds tending to excuse or justify the defendant's criminal conduct, though failing to establish a defense;

(5) The victim of the defendant's criminal conduct induced or facilitated its commission;

(6) The defendant has compensated or will compensate the victim of his criminal conduct for the damage or injury that he sustained;

(7) The defendant has no history of prior delinquency or criminal activity or has led a law-abiding life for a substantial period of time before the commission of the instant crime;

(8) The defendant's criminal conduct was the result of circumstances unlikely to recur;

(9) The character and attitudes of the defendant indicate that he is unlikely to commit another crime;

(10) The defendant is particularly likely to respond affirmatively to probationary treatment; and

(11) The imprisonment of the defendant would entail excessive hardship to himself or his dependents.

C. The court shall state for the record the considerations taken into account and the factual basis therefor in imposing sentence.

STATEMENT OF THE CASE

Your petitioners (hereinafter referred to as defendants), Mrs. Louise P. Bradshaw, now wife of Thomas H. Fergus, and Thomas H. Fergus, were charged by a Bill of Information in Ouachita Parish, State of Louisiana, with the crime of distribution of a controlled substance—marijuana, in violation of LSA R.S. 40:967. This offense took place in Monroe, Louisiana, on or about January 21, 1981.

Both defendants pled "Not Guilty" initially to such charge, but after a plea bargaining agreement, withdrew the plea of "Not Guilty" and entered the plea of "guilty" to the charge of Attempted Distribution of Marijuana.

A pre-sentence investigation was ordered. Upon the filing of the pre-sentence investigation, a Motion to

Traverse such pre-sentence investigation was filed by counsel for the defendants for the reason that such pre-sentence reports were inaccurate and misleading in the following:

1] That the defendant, Louise P. Fergus, was well known in narcotic circles for her illegal activities and had a continuing pattern of such drug activities; and

2] That there was information from a reliable confidential informant that she had been initially contacted by defendant Mrs. Fergus with reference to the marijuana sale.

During trial of the Motion to Traverse, witnesses for defendants testified that they had known them for several years; that they saw them frequently; that they socialized with them but had no knowledge of their being involved in illicit drug activities, and that both defendants had been employed during this period of time and accepted as law abiding citizens of the community. Both defendants also testified during such hearing.

Upon the conclusion of the testimony, the Trial Judge immediately pronounced sentence, giving each defendant five (5) years at hard labor plus a fine of $2500 and costs; the jail sentence being the maximum permitted under the law. (Appendix A).

It is from this sentence that an appeal was taken to

the Louisiana Supreme Court.

The basis for such appeal being:

1] The due process clause of the U.S. Constitution, Article 14, was violated in that:

a] The sentencing procedure of the Trial Judge did not properly individualize reasons for such sentences of each defendant as provided in LCCP Art. 894.1

b] The pre-sentence investigation contained material which is hearsay and unsubstantiated and defendants had the burden of disproving same.

c] The defendants were unable to cross examine the reliable confidential informant whose statements were the basis for the bringing of the charges against them.

2] That the sentences handed down constituted cruel and unusual punishment in accordance with Article VIII of the U.S. Constitution.

Federal constitutional questions were raised in the trial court by counsel for defendants after sentencing as noted on page 288 of the transcript:

"Your honor, at this time if it please the Court, we'd like to notify the Court of our intent to enter orders of appeal to the Louisiana Supreme Court on the basis of excessiveness of sentence which we object to at this point....."

And also in the assignment of errors as contained in transcript 195-196 (Appendix D).

Such constitutional questions were further presented before the Louisiana Supreme Court as evidenced by judgment of that court (Appendix B).

REASONS RELIED ON FOR GRANTING OF WRIT

The Court should grant the writ of certiorari because of the confusion and ambivalence of jurisprudence as to whether due process requires a contradictory pre-sentence hearing; the effect of pre-sentence information which is unreliable and unsubstantiated; and whether the defendant bears the responsibility of rebutting such material misinformation. See *Townsend v. Burke*, 334 U.S. 736, 68 S. Ct. 1252, 92 L.Ed. 1960 (1948); *Gardner v. Florida*, 430 U.S. 349, 97 S.Ct. 1197, 51 L.Ed.2d. 393 (1977); *U.S. v. Tucker*, 404 U.S. 443, 92 S.Ct. 589, 30 L.Ed.2d. 592 (1972); *U.S. v. Espinoza*, 481 F.2d. 553 (CA5 1973); *U.S. v. Malcolm*, 432 F.2d. 809, (CA1 1970); *U.S. v. Holder*, 412 F.2d 212, (CA2 1969).

Further, it being the accepted ruling of this Court that "punishment should fit the offender and not merely the crime", (*Roberts v. U.S.*, 100 S.Ct. 1358 (1980), did the Louisiana trial court in its misapplication of LCCP Art. 894.1 violate the due process clause of the 14th Amendment of the U.S. Constitution and result in sentences violative of Article VIII of the U.S. Constitution pro-

hibiting cruel and unusual punishment.

The pre-sentence investigation which was ordered by the trial court contained information to the effect that your defendant, Louise P. Fergus was known in illegal drug circles for her activities, and further, that defendants had made the initial contact with reference to the proposed drug sale. The Motion to Traverse the Pre-Sentence Investigation was granted by the trial court who stated the following on page 267 of the transcript of the record:

> "Now, the Court appreciated the two assertions, or maybe three assertions that are being traversed here, or sought to traverse here...are the aspects of the report indicating that Mrs. Fergus was known in narcotic circles for her illegal activities and also the assertions in the report that...she made the initial contact with the reliable informant and advised at that time that she had pounds of marijuana for sale, is that correct?"

During the course of the Motion to Traverse, no attempt was made by the prosecution to introduce evidence or other information to substantiate the allegations complained of.

In addition to the defendants, four witnesses testified on their behalf who had been familiar with them for a period of time prior to the alleged offense, and who stated to the best of their knowledge, that the defendants were not involved in illegal drug activities. In *Townsend v. Burke, supra*, this Court ruled that due process is violated

when the defendant is sentenced on the basis of such material misinformation. Although, this Court, in *Williams v. New York*, 337 U.S. 241, 69 S.Ct. 1079, 93 L.Ed. 1337 (1949), seemingly ruled that one should not be sentenced on the basis of material misinformation, nevertheless, it was not a lack of due process to prevent the defendant from inspecting or challenging the information contained in such pre-sentence report.

Since Louisiana does permit such challenge (*State v. Bosworth*, 360 So.2d. 173, (LA 1978) and *State v. Lockwood*, 399 So.2d 190, (LA 1981), and it was granted here, it must be determined that given the information or lack thereof, which is of record in the hearing on the Motion to Traverse the Pre-Sentence Investigation, were the due process rights of the defendants violated by the lack of evidence to substantiate the general statements that defendant Louise P. Fergus was well known in drug circles for her illegal drug activities, or that defendants had made the initial contact in the proposed drug sale?

Under the authority of *U.S. v. Weston*, 448 F.2d.626 (CA9, 1971), serious criminal charges may not be made in pre-sentence reports as was done here, solely on the basis of uncorroborated information of an undisclosed informant or informants, and further, where the defense has challenged the accuracy of the charges, the burden of corroboration must fall upon the prosecution. There, the 9th Circuit concluded that the burden of proving a negative fact should not be placed upon the defendant, and stated that accusa-

tions made in the pre-sentence report should not be relied upon unless "amplified by information such as to be persuasive of the validity of the charges there made."

The law in *Weston, supra,* is followed in *U.S. v. Needles,* 472 F.2d.652 (CA2, 1973), where the Court stated that in those instances where the defendants totally denied a significant charge upon which the sentencing Court sought to rely, that the prosecution should be requested to provide substantiation of the challenged information submitted to the Judge. Unless this is done, defendant is left with the almost impossible burden of attempting to prove a negative.

The decision of the Louisiana Supreme Court herein (Appendix B), stated that the defendant had attempted to disprove the statement that she was known in illegal drug circles by putting witnesses on the stand who had known her for several years. The comments of the Court with reference to this are most important and read as follows:

> "At the hearing, all of the witnesses testified that they had known the defendants for at least a year and had socialized with them frequently. They stated that at no time did they know defendant Bradshaw to be a member of any drug circle. We hesitate to accord much weight to these statements: these witnesses could not have testified as to whether Bradshaw was known in drug circles unless they themselves were in drug circles. But notwithstanding that observation, and assuming that Bradshaw was indeed a foreigner to drug cliques, the sentence meted out to Bradshaw is

supportable by the facts of record and is not excessive."

The above language begs the question, for how else does one go about disproving the allegation complained of, except by producing those people with whom one constantly associates. If in fact, the Louisiana Supreme Court is correct, then the defendants are faced with the question of "how to prove a negative, i.e., that I am not known in drug circles." This is an impossible evidenciary burden.

With reference to the comments of the Court about there being sufficient evidence to justify the sentences meted out by the trial court (which were the maximum), who can determine to what extent the uncorroborated information contained in such pre-sentence report, consciously or unconsciously, affected the trial judge's sentences?

As the Court said in *U.S. v. Espinoza, supra*, "sentences cannot be predicated on false information. We extend it but a little in holding that a sentence cannot be predicated on so little value as that therein involved. A rational penal system must have some concern for the accuracy of information and input of the sentencing process."

It should be noted that in his reasons for sentencing (Appendix A), despite his previous statement with reference to the purpose of the pre-sentence hearing, the Trial Judge makes no statement as to his findings as a

result of the hearing; no comment with reference to lack of appearance of the confidential reliable informant, or whether or not in truth the defendants were known in illegal drug circles. One is unable to ascertain how the testimony was evaluated by him, and there is a reasonable probability that his sentencing discretion was at least unconsciously influenced by the gross misinformation of constitutionally prejudicial magnitude contained in the presentence report.

With reference to the individualization of sentences, this Court's attention is invited to Appendix E and F, the printed forms which the trial judge used to insure his compliance with LCCP 894.1. If this form had been used properly, it certainly would have met the requirements of Federal due process as well as Louisiana procedure, but a casual reading will show that many mitigating circumstances with reference to both defendants were not considered.

Thomas H. Fergus had an honorable military record, a good educational background, good employment record and other than the present episode, had not been involved with the law in any way.

Mrs. Louise P. Fergus it is true, had two previous convictions; one for possession of a small amount of marijuana, and one for forgery of a small check for which she had made restitution. The last of these offenses was some seven (7) years prior to the present incident. There is no

mention made of her community activities, her attempts to counsel and advise young people, and other evidence which intended to show that she had put her past behind her.

It is inconceivable with such varied backgrounds, the Judge should have awarded both the maximum sentences by law.

Both the trial judge and the Louisiana Supreme Court stated that considerable leniency had already been extended to each defendant through plea bargaining, which allowed them to plead guilty to attempted distribution of marijuana. Such statement has almost become rote with many courts in attempts to justify the severity of sentences. As a practical matter, such statement is incorrect because plea bargaining is the result of many factors, and the fact that the defendants were permitted to plead to a lesser offense which makes them eligible for a lesser sentence is only one such factor. Crowded dockets, non-availability of witnesses by the prosecution, a weak case by the prosecution on the original charges, and attempts by the prosecution to maintain a high level of convictions are also some of the many reasons used for plea bargaining.

CONCLUSION

A writ of certiorari should issue to review the judgment and opinion of the Louisiana Supreme Court not only to correct the manifest errors of fact and law contained therein, but to resolve the constitutional questions involved in pre-sentence procedure which here has resulted in excessive and cruel punishment to both defendants, and violative of the due process clause of the United States.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on this _____ day of _____, 1982, three copies of the Petition for Writ of Certiorari were mailed, postage prepaid, to Levalle B. Salomon, Assistant District Attorney, Fourth Judicial District Court, P.O. Box 1652, Ouachita Parish, Monroe, Louisiana, and Ms. Barbara B. Rutledge, Assistant Attorney General, 234 Loyola Avenue, Suite 821, New Orleans, Louisiana, 70112.

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